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IN THE

Supreme Court of the United States

FREDERICK E. TONNIES; WILLIAM M. LEONHARDT; DAVID S. KAHL; ROBERT E. WILT; CLAY A. BERNICHON; SOLVEIG TSCHANN; FREDERICK W. HOPPE; LUDSON F. WORSHAM; EDWIN MARJALA; KENYON T. BEMENT; DONALD E. WAGNER; LUCIUS O. BROWNE, DONALD F. FABRY; THOMAS L. DURKIN, and BERNARD J. HART; individually and on behalf of all affected members of the Sperry, and Burroughs Classes,

Petitioners,

v.

UNISYS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners Frederick E. Tonnies, et al., submit this Supplemental Brief pursuant to Rule 15.8[1] to apprise the Court of two additional reasons for granting review in this case.

First, the U.S. Court of Appeals for the Second Circuit issued a decision on October 10, 2001 in *Caputo, et al. v. Pfizer, Inc.*, No. 00-7483, 2001 WL 1191501, 2001 U.S. App. LEXIS 21707 (2d Cir. October 10, 2001), which conflicts squarely with the ruling below on the important question presented regarding the "fraud or concealment" provision of ERISA's statute of limitations. The new decision thus deepens the circuit conflicts noted in the Petition and dramatically illustrates that review is warranted.

Second, *TRW, Inc. v. Adelaide Andrews*, No. 00-1045 (argued October 9, 2001), presents questions regarding claim accrual and the application of limitations rules under another civil statute, and the awaited outcome of that case potentially will relate to some of the issues raised here. The Court should, accordingly, note this relationship between the cases and consider whether to defer disposition of the present Petition pending the decision in *Andrews*.

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1. On September 28, 2001, Respondent Unisys Corporation filed a Cross-Petition for a Writ of Certiorari. *Unisys Corporation v. Frederick E. Tonnies, et al.*, No. 01-554. Although not clearly denoted as such in conformity with Rule 12.5, the Cross-Petition is conditional. Respondent Unisys did not file any response to the Petition in this main case (No. 01-367), but instead filed a waiver of response on October 5, 2001. As Petitioners had no occasion to submit a Reply Brief in which they could bring the matters discussed herein to the Court's attention, they submit this Supplemental Brief instead.

Further, inasmuch as Petitioners believe that the questions presented by Unisys in its Conditional Cross-Petition were not fully raised in the lower court and were not addressed by that court, Petitioners at this time are waiving the filing of a brief in response to the Conditional Cross-Petition.

A. The Second Circuit Has Expressly Rejected the Ruling by the Third Circuit on ERISA's "Fraud or Concealment" Provision, Deepening the Circuit Conflict Noted in the Petition in this Case.

On October 10, 2001, the Second Circuit issued its decision in *Caputo, et al. v. Pfizer, Inc.*, No. 00-7483, F.3d, 2001 WL 1191501, 2001 U.S. App. LEXIS 21707 (2d Cir. October 10, 2001).

In *Caputo*, the Second Circuit reversed the grant of summary judgment against employees who claimed that their former employer violated ERISA's fiduciary duty provisions, 29 U.S.C. § 1104(a), by misrepresenting its intentions to later offer an enhanced special early retirement program. Having been led to believe, falsely, that no such program would be forthcoming, the employees took normal retirements and thereby lost the opportunity to accept the superior terms of the enhanced program that was announced several months later. 2001 WL 1191501 at *1-3, 2001 U.S. App. LEXIS 21707 at *3-10.

The employer moved for summary judgment on the ground that the employees' claims, which were filed approximately five years after the announcement of the enhanced program, were time-barred under the ERISA statute of limitations governing fiduciary breach claims, 29 U.S.C. § 1113. The district court granted the motion, ruling that the claims were not governed by the provision applicable to "case[s] of fraud or concealment" but instead were governed solely by the alternate three-year statute which ran from the date of "actual knowledge" and that this provision barred the claims. 2001 WL 1191501 at *4, 2001 U.S. App. LEXIS 21707 at *12.

The Second Circuit disagreed with both rulings and vacated the summary judgment. As pertinent to the Petition, the court ruled that:

1. The rulings of other circuits, including the Third Circuit's decision in this case, have improperly "fuse[d] the phrase 'fraud

or concealment' into the single term 'fraudulent concealment.'" The genesis of this erroneous rule was "a footnote in a district court opinion that cites no legal support for the proposition." 2001 WL 1191501 at *6 & n.2, 2001 U.S. App. LEXIS 21707 at *16-17 & n.2, *citing Schaefer v. Arkansas Med. Society*, 853 F.2d 1487, 1491-92 (8th Cir. 1988), which in turn relied on *Foltz v. U.S. News and World Report, Inc.*, 663 F. Supp. 1494, 1537 n.66 (D.D.C. 1987). *Compare* Petition at 15-17.

2. The "fraud or concealment" provision does not actually toll the statute of limitations, but instead "prescribes a separate statute of limitations of six years from the date of discovery." 2001 WL 1191501 at *6, 2001 U.S. App. LEXIS 21707 at *17.

3. Principles of statutory interpretation "counsel strongly against merging the two terms" of fraud and concealment. 2001 WL 1191501 at *6, 2001 U.S. App. LEXIS 21707 at *18; *compare* Petition at 8 (quoting separate opinion of Judge Mansmann), 12-14.

4. The plain language of the statute states that it is applicable to cases of "fraud or concealment" and at the time of ERISA's enactment, the definitions of "fraud" and "concealment" respectively included (a) false representations "by false or misleading allegations or by concealment of that which should have been disclosed" and (b) the "withholding of something which one knows and which one, in duty, is bound to reveal." 2001 WL 1191501 at *6, 2001 U.S. App. LEXIS 21707 at *18-19; *compare* Petition at 10-11 & n.2 (canvassing state trust law cases).

5. Giving each term its required "independent significance," the six year "fraud or concealment" provision:

> should be applied to cases in which a fiduciary: (1) breached its duty by making a knowing misrepresentation or omission of a material fact to induce an employee/beneficiary to act to his

> detriment; or (2) engaged in acts to hinder the discovery of a breach of fiduciary duty. *In re Unisys Corp. [Retiree Medical Benefit ERISA Litigation]*, 242 F.3d [497] at 513-16 [(3d Cir. 2001)] (Mansmann, J., concurring in the result in part).

2001 WL 1191501 at *6, 2001 U.S. App. LEXIS 21707 at *20.

6. This reading was "amply supported by the provision's legislative history." Based on its review of an earlier draft of the "fraud or concealment" provision, the court concluded that, "Clearly, Congress intended to provide a lengthier statute of limitations where the fiduciary breached its duty by misrepresenting or failing to disclose a material fact that ERISA required the fiduciary to disclose, most likely because such violations would be difficult to discover." 2001 WL 1191501 at *7, 2001 U.S. App. LEXIS 21707 at *20-21.

7. "Fraud" encompasses a fiduciary's "affirmative misrepresentation, omission or concealment of a material fact." The independent term "concealment" incorporates the distinct doctrine of "fraudulent concealment." 2001 WL 1191501 at *7, 2001 U.S. App. LEXIS 21707 at *21; *compare* Petition at 12-14.

In summary, this new decision of the Second Circuit represents a further split among the circuits on the proper application of ERISA's "fraud or concealment" limitations provision. *Caputo* is the first decision rendered by another circuit that addresses the decision below. It squarely rejects the analysis adopted by Judges Stapleton and Nygaard and, instead, adopts the analysis expressed in Judge Mansmann's separate opinion.

B. The Court's Decision in *TRW v. Andrews* May Formulate Rules Pertinent to the Question of Claim Accrual That Is Presented by the Petition.

On October 9, 2001 the Court heard argument in *TRW, Inc. v. Adelaide Andrews*, No. 00-1045 (argued October 9, 2001). That case presents questions regarding claim accrual and application of the two-year limitations provision of the Fair Credit Reporting Act, 15 U.S.C. § 1681p. The lower court had ruled that this express limitations provision was also governed by a general discovery rule implied under federal law. *See Andrews v. TRW, Inc.*, 225 F.3d 1063, 1066-67 (9th Cir. 2000).

Although this case does not raise any question of the sort raised in *Andrews* with respect to the propriety of interpreting a statute to encompass an *implicit* discovery rule exception, *Andrews* nevertheless involves subsidiary issues regarding the accrual of claims for disclosures of incorrect credit information that were sued upon more than two years after the disclosures but within two years of a denial of credit based upon that information. These issues relate to the second question presented here — when the "last action which constituted a part of the breach or violation," 29 U.S.C. § 1113(1)(A), occurs for purposes of commencing ERISA's alternate six-year statute of limitations.

Petitioners therefore believe that the forthcoming decision of *Andrews* may have some bearing on issues raised by their Petition. Petitioners accordingly request that the Court note the potential relatedness between the two cases and, if appropriate, defer disposition of the Petition until *Andrews* has been decided.

CONCLUSION

For the reasons stated here and in the Petition, Petitioners respectfully pray that the Petition be granted and that a writ of certiorari issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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